



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 11, 1996

Mr. Gary Keene
General Counsel
Dallas/Fort Worth International Airport
P.O. Drawer 619428
DFW Airport, Texas 75261-9428

OR96-2362

Dear Mr. Keene:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102274.

The Dallas/Fort Worth International Airport Board (the "board") received a request for a proposal submitted to the board by Lombardi's, Inc. (the "company"). You state that the company has requested that the board withhold its proposal pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. As the contract has already been awarded, section 552.104 is inapplicable.

You also cite to section 552.305 of the Government Code, which provides that when a request for information could involve a person's privacy or property rights, a governmental body may decline to release the information for the purpose of requesting an attorney general's decision. Thus, we assume that you are asserting the company has a protected privacy or property interest in the proposal. As provided by section 552.305, this office provided the company the opportunity to submit reasons as to why the information at issue should be withheld from disclosure. The company asserts that certain documents are excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code.

Section 552.101 protects from disclosure information made confidential by law, including information made confidential by common-law privacy. We note initially that there is no protected common-law privacy interest in financial information about a business. Open Records Decision No 192 (1978) at 4 (right of privacy protects feelings of human beings, not property, business, or other monetary interest). Included in the documents submitted to this office, however, is a personal financial statement, and another document involving a guarantee by an individual. These documents were labeled by the company as pages A0124 through A0127.

The test to determine whether information is private and excepted from disclosure under common-law privacy is whether the information is (1) highly intimate or embarrassing to a reasonable person, and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977). Common-law privacy generally protects the background financial information of an individual, such as information about an individual's overall financial status. Open Records Decision No. 373 (1983). However, information concerning a transaction between an individual and the governmental body is generally of legitimate public interest and must be disclosed. Open Records Decision No. 590 (1991) (common-law privacy does not protect information identifying individuals making pledges and donations to university or amounts of pledges and donations).

The personal financial statements labeled as pages A0124 through A0126 are protected from disclosure on the basis of common-law privacy. However, the guarantee appears to be part of a transaction between an individual and the board. Thus, the guarantee, labeled as page A0127, is not protected from disclosure on the basis of common-law privacy.

We now turn to the company's arguments under § 552.110. Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure if a *prima facie* case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the

business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.; *see also* Open Records Decision No. 522 (1989).

Section 552.110 protects from disclosure commercial or financial information, as long as a company shows that disclosure is likely to either impair the governmental body's ability to obtain information in the future or that it will cause substantial harm to the competitive position of the company. Open Records Decision No. 639 (1996). "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure."

The company has asserted that portions of its proposal are protected from disclosure.¹ We address only those portions of the proposal for which the company has asserted section 552.110 protection and that are not otherwise protected under the common-law privacy aspect of section 552.101.² The company has not demonstrated that the employee handbook, labeled as pages A0005 through A0028, is the type of information that is protected from disclosure under either the trade secret or the commercial and financial

¹The portions of the handbook that are not at issue should be released.

²The personal guarantee, labeled as page A0127, as we have previously discussed, concerns a transaction between the governmental body and an individual and is not protected from disclosure under common-law privacy. Neither is it protected from disclosure under either prong of section 552.110.

information aspects of section 552.110. The company has shown the applicability of section 552.110 to the management training and development program, labeled as pages A0032 through A0109; the rent calculation form, labeled as page A0111; the proforma operating statement, labeled as pages A0112 and A0113; the balance sheets and statements of income, labeled as pages A0115 through A0123; and the cost analysis, labeled as page A0128.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 102274

Enclosures: Marked documents

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